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VERMONT ENVIRONMENTAL BOARD

10 V.S.A. Chapter 151

RE: Rome Family Corporation by
Eugene Rakow, Esq.
Biederman & Rakow,
92 Allen Street
Rutland, VT 05701

Memorandum of Decision
Application
#1R0410-3-EB

This decision pertains to a motion to dismiss filed by the Town of Sherburne in the above-referenced matter. For the reasons given below, this motion is denied.

On November 9, 1988, the District #1 Environmental Commission denied Land Use Permit Amendment Application #1R0410-3, filed by Rome Family Corporation for an already-constructed parking lot adjacent to the Ski Shack, a commercial facility at the intersection of Route 4 and the Killington Road in Sherburne. The District Commission found, pursuant to Criterion 5, that the parking lot, as constructed, causes unsafe traffic conditions because the slope of the parking lot obstructs sight distances for cars turning onto Route 4 from the Killington Road and, pursuant to Criterion 9(K), that these conditions endanger public investments by jeopardizing safety on public roads. On November 18, 1988, the Applicant filed with the Environmental Board a general appeal of the District Commission's decision, and on December 22, 1988, it filed with the Board a revised appeal of the decision specifically concerning Criteria 5 and 9(K).

On December 22, 1988, a prehearing conference was convened by Environmental Board Chairman Leonard U. Wilson in Rutland, Vermont. On December 30, 1988, the Board issued a prehearing conference report and order summarizing the issues and setting a schedule for further proceedings in this matter. On January 19, 1989, the Town of Sherburne filed a motion to dismiss this matter pursuant to the doctrine of res judicata, Board Rule 34, and the intent of Act 250. On January 23, 1989, the Rome Family Corporation (the Applicant) filed a Motion to Limit, alleging that the Town of Sherburne is estopped from participating in this matter. On January 27, 1989, the Applicant filed a memorandum in support of its motion.

Because resolution of the Town's motion was potentially dispositive of this matter without factfinding, the Board issued on February 2, 1988 an amended order postponing an evidentiary hearing and allowing oral argument on the Town's motion. This argument was convened on February 8, 1989 in Hyde Park, Vermont, Chairman Leonard U. Wilson presiding. Parties participating included the Applicant by Eugene Rakow, Esq. and the Town of Sherburne by Mark Sperry, Esq. Following this argument, the Board deliberated on the Town's

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motion, and determined to deny it for the reasons set forth below. The Applicant and the Town were orally notified of this decision on Monday, February 13, 1989, and a hearing date was set for March 15, 1989 by separate notice.

BACKGROUND

The following facts are not disputed in this matter. The Applicant owns the Ski Shack and adjacent parking lot. Land Use Permit #1R0410 was issued for this facility on August 5, 1981. The project was built, but the parking lot was not constructed in compliance with conditions of this permit. The Applicant applied to the District Commission for permit amendment #1R0410-3 in order to correct this situation by revising the permit to authorize the parking lot as built.

DECISION

The Town contends essentially that the Board must dismiss the appeal because the Board and District Commission are barred in this case from considering an amendment to rectify noncompliance with the original permit. The Town alleges three separate grounds for its motion: the intent of Act 250, Board Rule 34, and the legal doctrine of res judicata.

The Applicant contends that it deserves an opportunity to present the facts of this case because extenuating circumstances exist concerning the permit noncompliance which the Board should hear. These alleged circumstances include: good faith, honest error, the diligence of the Applicant in attempting to rectify its noncompliance, and the availability of alternatives to the existing permit conditions which would accomplish the goals of these conditions relating to the parking lot. The Applicant also argues that the doctrine of res judicata does not apply to Act 250 permits because if it did the Board would not have the power to grant permit amendments.

The Board concludes that the Town's motion must be denied on all grounds. First, the "intent of Act 250" does not provide an independent basis for dismissing an appeal. Although Act 250's intent is relevant to interpreting the Act and Board rules, there must be a specific authorization for dismissal elsewhere in the statute or rules.

Second, Board Rule 34 does not on its own terms permit disposition without factfinding of applications for permit

amendments to correct the type of permit noncompliance which is conceded here. Rule 34 provides:

> (A) Amendments required. An amendment shall be required for any material or substantial change in a permitted project, or any administrative change in the terms and conditions of a land use permit. Applications for amendments shall be on forms provided by the board, and shall be filed with the district commission having jurisdiction over the project. Upon request, the district coordinator will expeditiously review a proposed change and determine whether it would constitute a substantial change to the project, or whether it involves only material or administrative changes that may be subject to simplified review procedures.

This rule requires amendment when there is a material or substantial change in a permitted project or when an administrative change is sought in the terms and conditions of a permit. The rule provides for simplified review procedures which allow for disposition of an application without hearing if an amendment is sought for material or administrative changes; the change requested here does not qualify as material or administrative. See Rule 34(C), (D); Rule 51(B).

In this case, the District Commission accepted the permit amendment application and held a hearing. Following the District Commission's decision, the Applicant appealed pursuant to 10 V.S.A. § 6089(a), which grants the Applicant the right to appeal. Rule 34 does not provide that the Board may reject without an evidentiary hearing an appeal from a decision on an amendment application on the ground that the proposed amendment would simply correct noncompliance with an existing permit. Accordingly, the Board is not empowered by Rule 34 to dismiss this appeal prior to hearing the facts.

Third, the doctrine of res judicata does not bar this amendment application. "Res judicata" is a Latin phrase meaning "thing decided." It is a legal doctrine invented by the courts to provide a semblance of finality to litigation so that a matter which has already been decided need not be decided again. Under the doctrine, a lawsuit can be barred if, with respect to a previous lawsuit, the parties, subject matter and causes of action are substantially identical, and the previous lawsuit was pursued to a final judgment. Berisha v. Hardy, 144 Vt. 136, 138 (1984).

The Vermont Supreme Court does not appear to have considered whether res judicata applies to proceedings before administrative agencies. However, under federal law, the doctrine has been applied to such proceedings but in a "relaxed" manner. The need for finality in administrative proceedings is often outweighed by considerations of policy or practice. Town of Springfield, Vermont v. Environmental Board, 521 F. Supp. 243 (1981).

The Board accepts res judicata as a doctrine which is relevant to proceedings before the Board and district commissions, but concludes that the doctrine should be relaxed in the face of important policy or practical considerations. Certainly situations exist in which the doctrine should apply. For example, a declaratory ruling petition should be barred if the petitioner has already requested and received a declaratory ruling on the same issue with respect to the same project or set of facts. Similarly, an application for a previously-denied project that includes no changes from the denied application should not be allowed.

However, res judicata would not be appropriate for many situations which arise in the Act 250 process. To begin with, the Board and district commissions must be able to reopen matters in which new evidence indicates that a permit may have been incorrectly granted or denied. In addition, motions to reconsider permit decisions must be allowed to the district commissions in order to enable applicants to correct deficiencies in applications. Other situations may exist as well in which res judicata should not apply; it i's impossible to list all of them here.

In this case, the Board concludes that the policy of finality in proceedings is outweighed by a policy of allowing persons to be heard concerning permit amendment requests. The Board believes that parties seeking permit amendments should be allowed to explain the facts of their amendment proposals and the reasons for seeking them. Accordingly, the Board rules that res judicata does not bar the Applicant's appeal.

The Board does not mean to imply that it looks favorably at permittees who do not build in compliance with permits and then seek to amend their permits to comport with what they have actually built. As the Board has previously stated:

> The use of Rule 34 for the purpose of correcting violations undermines the integrity of the Act 250 process by encouraging applicants to use the amendment

process as a device to renege on promises and representations made during the original application process.

Quechee Lakes Corporation, #3W0364-1A-EB, Findings of Fact, Conclusions of Law and Order at 14 (February 3, 1987). Nevertheless, the Board cannot use the permit amendment process as a substitute for revocation or enforcement proceedings, which are the proper means for addressing noncompliance with permits.

ORDER

The Town of Sherburne's motion to dismiss is hereby denied.

Dated at Montpelier, Vermont this 2nd day of May, 1989.

ENVIRONMENTAL BOARD

Jan S. Eastman, Acting Chair

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